SUPREME COURT, U. S.

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No. 75-579

In the Supreme Court of the United States

OCTOBER TERM 1975

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I.

REASON FOR FILING THIS SUPPLEMENTAL BRIEF

This supplemental brief is filed pursuant to Supreme Court Rule 24(5) in order to call this Court's attention to the virtual identity in the question presented by the instant case and that presented in *United States* v. *Agurs* (Supreme Court Docket No. 75-491). On petition of the Solicitor General, certiorari was granted in *Agurs* on November 17, 1975, after the petition in the present case had been filed.

II.

THE REASONS FOR GRANTING CERTIORARI IN AGURS APPLY A FORTIORI TO ESPOSITO

Both *Agurs* and *Esposito* present the question of whether the prosecutor's non-disclosure of information favorable to the defense, but not directly related to events out of which the indictment arose, deprived defendant of his constitutional rights. In *Agurs,* a murder prosecution, the undisclosed information concerned the criminal history of the decedent. In *Esposito,* a narcotics (cocaine) prosecution, the prosecutors withheld the fact that their most important witness (an informer who set up the transaction) had confessed to a number of very serious crimes for which he was never prosecuted. In neither *Esposito* nor *Agurs* was there a specific defense request for the precise information which was not disclosed. In *Esposito,* unlike *Agurs,* however, there was a general defense request for *Brady* material. Most significantly *Esposito* was a case in which the prosecutor *knew* at the time of trial of the damaging impeachment of his star witness but failed to disclose it.

In successfully urging that certiorari be granted in *Agurs,* the Solicitor General argued that the Court of Appeals opinion in that case carried "potentially revolutionary implications for the standards of conduct governing the behavior of federal government prosecutors" (A. 13) and that this Court's guidance was needed to enable the government to formulate disclosure standards for its prosecutors. (A. 7) We submit that those arguments apply no less to *Esposito,* a case in which the Seventh Circuit restricts the prosecutor's traditional disclosure responsibilities, than to *Agurs,* in which the District of Columbia Circuit expanded those duties.

The other reasons recited by the government for granting a writ in *Agurs* apply a fortiori to *Esposito.*

In *Agurs* the Solicitor General pointed out that (A. at 10):

> "[a] deliberate governmental decision to suppress information of central importance to the defense, made for the specific purpose of deception, or even a failure to disclose exculpatory evidence whose high value to the defense could not escape the prosecutor's attention, may violate the prosecution's obligation to ensure, *sua sponte*, that the accused is not wrongfully convicted."

This is precisely what occurred in *Esposito.* The prosecutors knew full well that the *Esposito* defense was aimed at discrediting the informer (Crimaldi), showing that he had a special selfish motive to help the government and was fully capable of "setting up" and falsely implicating Mr. Esposito. Yet, even with that knowledge, the prosecutors failed to disclose either in response to the *Brady* request or at the time of trial that their witness had admitted to a life of heinous crimes—crimes for which he has never been prosecuted. As we point out in the Esposito petition the government's trial counsel exacerbated the nondisclosure by arguing to the jury that the informer was a solid citizen with no motive to lie.

In urging that a writ of certiorari issue in *Agurs,* the government pointed out that there had been no *Brady* request made in that case, and since defense counsel was aware of the underlying facts, he could have drafted an appropriate request for the information in order to trigger the prosecutor's search for it. In contrast, in *Esposito* there was a general request for *Brady* material, the response to which did not reveal the existence of any government debriefings of the informer, and defense counsel

had no way of knowing that the informer had confessed to a litany of unprosecuted crimes. It was only after trial when the informer went to the newspapers with his life history that defense counsel first guessed that the prosecution may have withheld important impeaching evidence.

The non-disclosure in *Agurs* may be excused, as is pointed out in the petition for writ of certiorari (A. 4), by virtue of the fact that neither of the prosecution nor the defense believed the undisclosed evidence to be admissible. But there is no question that the evidence withheld in *Esposito* would have been usable to impeach the informer's testimony.

III.

CONCLUSION

This Court has seen fit to grant certiorari in the *Agurs* case. We respectfully submit that the similarity of the question presented by the present case to that presented in *Agurs* makes it appropriate that the cases be considered together.

Respectfully submitted,

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